OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 30, 2003

Mr. Therold Farmer
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
6300 La Calma
Suite 200
Austin, Texas 787752

OR2003-5269

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185169.

The Refugio Independent School District (the "district"), which you represent, received a request for the district's policy relating to the use of district property for personal use and matters not related to the district, as well as the district's contract for internet services and invoices for those services for specified months. You inform us that this information has been released to the requestor. The requestor has also asked for the following information regarding 13 named district employees:

> [t]he user history, data and internet/e-mail dialogue, including dates and times of use, if any between the herein named employees of the [district] and the Internet website/business entity and IP address, "The Old Coach Network (www.theoldcoach.com)." This request shall be construed and shall be limited to the use and exchange of information via the [district] computer and internet system and limited to the exchange of information/comments concerning the advertisement, hiring and resignation of past and present [district] athletic directors for the time period of March, 2003 through the date of this amended request.

> The user history, data and internet/e-mail dialogue, including dates and times of use, if any between the herein named employees of the [district] and the Internet website/business entity and IP address, "The Old Coach Network (www.theoldcoach.com);" such requested information to be limited to the exchange of information/comments by employees of the [district], directly, indirectly, by innuendo or by initials, regarding [two named district students and their parents].[1]

You first assert that the requested internet and e-mail information is not public information subject to release under the Public Information Act (the "Act"). You further contend that the district would violate both the United States and Texas constitutions by searching for and then submitting to this office any responsive internet and e-mail information. Alternatively, you argue that this information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.[2] We have considered your arguments.

We first address your contention that the requested internet and e-mail information does not constitute public information subject to disclosure under the Act. Chapter 552 of the Government Code is only applicable to public information. *See* Gov't Code § 552.021. Section 552.002 of the Government Code defines "public information" as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." We note that public information may be recorded on various media, including "a magnetic, optical, or solid state device that can store an electronic signal." *Id.* § 552.002(b). Furthermore, "[t]he general forms in which media containing public information exist include ... a voice, data, or video representation held in computer memory." *Id.* § 552.002(c).

You state that the district "could, I assume, remove hard drives from perhaps a dozen and a half computers and probably recover most of the data and/or hire a consultant to download them." You also acknowledge that the district has "physical ownership of the hardware" and that there are e-mail files on the district's server and the district-owned hard drive, as well as the district's contracted service provider. However, you argue that "any act of the District

---

[1]You inform us that after an exchange of e-mails, the requestor amended his original request as reflected above.

[2]We note that you also raise section 552.305 of the Government Code as an exception to disclosure. Section 552.305 states in relevant part that "[i]n a case in which information is requested under this chapter and a person's privacy or property interests may be involved . . . a governmental body may decline to release the information *for the purpose of requesting an attorney general decision*." Gov't Code § 552.305 (emphasis added). Consequently, section 552.305 is not an exception to public disclosure under the Act. Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private while the governmental body is seeking an attorney general's decision under the Act.

in maintaining the personal e-mails and internet dialogue of its employees is purely incidental to District business." Further, you argue that "personal employee e-mails and internet dialogues prepared by individual employees for their personal communication or entertainment are certainly not sent or received pursuant to law and have no connection with the transaction of the official business of [the district] and, thus, fail the second prong of the statutory definition." Finally, you assert that "not one of the named District employees possess any authority, under state law, local policy, or District custom and practice, to recommend or cause the hiring, firing, or resignation of the athletic director, which is an administrative position within [the district]."

In this case, we find that the subject matter of the requested information, namely, "[t]he user history, data and internet/e-mail dialogue, including dates and times of use" relating to a particular website and pertaining to the "advertisement, hiring and resignation of past and present [district] athletic directors" and to two named district students and their parents, on its face, relates to the transaction of official district business. Because you have not submitted any responsive information to this office for our review, as required by section 552.301(e) of the Government Code, we have no basis to conclude that any responsive e-mail or internet communications contain information that is purely personal in nature and therefore unrelated to the transaction of official district business, and thus outside the purview of the Act. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Accordingly, we find that the requested information is public information for purposes of section 552.002, and therefore it is subject to disclosure under the Act. *See* Open Records Decision No. 549 (1990) (finding that holding in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), makes clear that almost all information in physical possession of governmental body is "public information" subject to Act).

We now address the district's responsibilities under section 552.301 of the Government Code. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why any stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. As noted above, you did not submit to this office any responsive e-mail or internet communications or a representative sample thereof. You argue that the district would violate Article I, Section 9 of the Texas Constitution ("Article I, Section 9") and the Fourth Amendment to the United States Constitution (the "Fourth Amendment") by searching for, printing and submitting to this office any responsive e-mail or internet information. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Similarly, Article I, section 9 provides:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

You summarize the reason for the district's failure to submit this information as follows:

> [t]he District not having extinguished by policy and practice its employees' reasonable expectation of privacy in their personal emails and internet dialogues, those employees have some expectation of privacy therein. Therefore, to reveal and print those items (for submission to this office pursuant to section 552.301) would require a search. That search could not at present be based on any reasonable cause or suspicion. Therefore, the District would violate the employees' Fourth Amendment rights were it to perform such a search.

However, we note that, according to information you submitted to this office, the district's policy concerning "Electronic Communication and Data Management" provides that "[e]lectronic mail transmissions and other use of the electronic communications system by students and employees shall not be considered private," and that "[d]esignated District staff shall be authorized to monitor such communication at any time to ensure appropriate use." Upon review of your arguments and the information at issue, we conclude that the district is not prohibited by either Article I, Section 9 or the Fourth Amendment from collecting information responsive to the request and providing it to this office for review. *See United States v. Simmons*, 206 F. 3d 392 (4th Cir. 2000) *cert. denied*, 534 U.S. 930 (2001) (public employer's remote, warrantless search of employee's office computer did not violate his Fourth Amendment rights because, in view of employer's internet policy, employee lacked legitimate expectation of privacy); *see also* Open Records Decision No. 467 (1987) (rejecting argument that "search" of personnel file by school district to extract certain information to respond to records request was prohibited by Fourth Amendment where "search" in question is of government file, not of personal file). Therefore, we conclude that any responsive internet and e-mail information was required to be submitted to this office pursuant to section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted any responsive internet and e-mail information to this office for review, we have no basis for finding it confidential. Thus, we have no choice but to order any such information released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 185169

c: Mr. Dwayne McWilliams
Schneider & McWilliams, P.C.
P.O. Drawer 550
George West, Texas 78022